

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jun 10, 2021

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ROGER B.,¹

Plaintiff,

v.

ANDREW M. SAUL, the Commissioner
of Social Security,

Defendant.

No. 4:20-CV-5126-EFS

**ORDER GRANTING PLAINTIFF'S
SUMMARY-JUDGMENT MOTION
AND DENYING DEFENDANT'S
SUMMARY-JUDGMENT MOTION**

The summary-judgment motions ask the Court to determine, amongst other issues, whether the Administrative Law Judge (ALJ) needed to subpoena the treatment records or testimony of Plaintiff Roger B.'s treating counselor. Because the ALJ found the counselor's treatment records were material to the consideration of her opinion, the ALJ erred by not subpoenaing either the counselor's records or

¹ To protect the privacy of the social-security Plaintiff, the Court refers to him by first name and last initial or as "Plaintiff." See LCivR 5.2(c).

1 testimony.² Remand is necessary because this error impacted the ALJ's weighing of
 2 the medical opinions and other analysis.

3 I. Five-Step Disability Determination

4 A five-step sequential evaluation process is used to determine whether an
 5 adult claimant is disabled.³ Step one assesses whether the claimant is currently
 6 engaged in substantial gainful activity.⁴ If the claimant is engaged in substantial
 7 gainful activity, benefits are denied.⁵ If not, the disability evaluation proceeds to
 8 step two.⁶

9 Step two assesses whether the claimant has a medically severe impairment,
 10 or combination of impairments, which significantly limits the claimant's physical
 11 or mental ability to do basic work activities.⁷ If the claimant does not, benefits are
 12 denied.⁸ If the claimant does, the disability evaluation proceeds to step three.⁹

15 ² ECF Nos. 16 & 17.

16 ³ 20 C.F.R. § 416.920(a).

17 ⁴ *Id.* § 416.920(a)(4)(i).

18 ⁵ *Id.* § 416.920(b).

19 ⁶ *Id.*

20 ⁷ *Id.* § 416.920(a)(4)(ii).

21 ⁸ *Id.* § 416.920(c).

22 ⁹ *Id.*

1 Step three compares the claimant's impairments to several recognized by the
2 Commissioner to be so severe as to preclude substantial gainful activity.¹⁰ If an
3 impairment meets or equals one of the listed impairments, the claimant is
4 conclusively presumed to be disabled.¹¹ If an impairment does not, the disability
5 evaluation proceeds to step four.

6 Step four assesses whether an impairment prevents the claimant from
7 performing work he performed in the past by determining the claimant's residual
8 functional capacity (RFC).¹² If the claimant is able to perform prior work, benefits
9 are denied.¹³ If the claimant cannot perform prior work, the disability evaluation
10 proceeds to step five.

11 Step five, the final step, assesses whether the claimant can perform other
12 substantial gainful work—work that exists in significant numbers in the national
13 economy—considering the claimant's RFC, age, education, and work experience.¹⁴
14 If so, benefits are denied. If not, benefits are granted.¹⁵

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16 ¹⁰ *Id.* § 416.920(a)(4)(iii).

17 ¹¹ *Id.* § 416.920(d).

18 ¹² *Id.* § 416.920(a)(4)(iv).

19 ¹³ *Id.*

20 ¹⁴ 20 C.F.R. § 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496, 1497-98 (9th Cir.
21 1984).

22 ¹⁵ 20 C.F.R. § 416.920(g).

1 The claimant has the initial burden of establishing entitlement to disability
2 benefits under steps one through four.¹⁶ At step five, the burden shifts to the
3 Commissioner to show that the claimant is not entitled to benefits.¹⁷

4 **II. Factual and Procedural Summary**

5 On October 5, 2016, Plaintiff filed a Title XVI application, alleging a
6 disability onset date in 2009.¹⁸ His claim was denied initially and upon
7 reconsideration.¹⁹ An administrative hearing was held before Administrative Law
8 Judge Mark Kim.²⁰

9 In denying Plaintiff's disability claim, the ALJ made the following findings:

- 10 • Step one: Plaintiff had not engaged in substantial gainful activity
11 since the application date.
- 12 • Step two: Plaintiff had the following medically determinable severe
13 impairments: depressive disorder and posttraumatic stress disorder
14 (PTSD).

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16 ¹⁶ *Parra v. Astrue*, 481 F.3d 742, 746 (9th Cir. 2007).

17 ¹⁷ *Id.*

18 ¹⁸ AR 177-202. Because the application filing date starts the relevant period for
19 Title XVI claims, the ALJ appropriately considered whether Plaintiff was disabled
20 beginning October 5, 2016.

21 ¹⁹ AR 106-23.

22 ²⁰ AR 48-82.

- Step three: Plaintiff did not have an impairment or combination of impairments that met or medically equaled the severity of one of the listed impairments.

- RFC: Plaintiff had the RFC to perform a full range of work at all exertional levels but with the following nonexertional limitations:

He can perform simple, routine tasks with a reasoning level of 2 or less, with occasional job-related decision-making and simple changes in the work setting. He can have less than occasional and superficial contact with the general public and coworkers.

- Step four: Plaintiff was capable of performing past relevant work as an industrial cleaner.
- Alternatively, step five: Plaintiff was capable of performing work as a hand packager, laborer, and small product assembler.²¹

When assessing the opinion evidence, the ALJ gave:

- partial weight to the examining opinion of Kirsten Nestler, M.D., and the reviewing opinions of Michael Regets, Ph.D., and Kristine Harrison, Psy.D.
- little weight to the treating opinion of Erin Sharma, LMHC, the examining opinion of N.K. Marks, Ph.D., and the reviewing opinion of Luci Carstens, Ph.D.²²

²¹ AR 23-39.

²² AR 31-33.

1 The ALJ also found Plaintiff's medically determinable impairments could
 2 reasonably be expected to cause some of the alleged symptoms, but his statements
 3 concerning the intensity, persistence, and limiting effects of those symptoms were
 4 not entirely consistent with the medical evidence and other evidence in the
 5 record.²³ Likewise, the ALJ discounted the lay statement from Plaintiff's estranged
 6 wife.²⁴

7 Plaintiff requested review of the ALJ's decision by the Appeals Council,
 8 which denied review.²⁵ Plaintiff timely appealed to this Court.

9 **III. Standard of Review**

10 A district court's review of the Commissioner's final decision is limited.²⁶ The
 11 Commissioner's decision is set aside "only if it is not supported by substantial
 12 evidence or is based on legal error."²⁷ Substantial evidence is "more than a mere
 13 scintilla but less than a preponderance; it is such relevant evidence as a reasonable
 14 mind might accept as adequate to support a conclusion."²⁸ Moreover, because it is
 15 the role of the ALJ and not the Court to weigh conflicting evidence, the Court
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17 ²³ AR 30-31.

18 ²⁴ AR 33.

19 ²⁵ AR 1-6.

20 ²⁶ 42 U.S.C. § 405(g).

21 ²⁷ *Hill v. Astrue*, 698 F.3d 1153, 1158 (9th Cir. 2012).

22 ²⁸ *Id.* at 1159 (quoting *Sandgate v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997)).
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1 upholds the ALJ's findings "if they are supported by inferences reasonably drawn
2 from the record."²⁹ The Court considers the entire record.³⁰

3 Further, the Court may not reverse an ALJ decision due to a harmless
4 error.³¹ An error is harmless "where it is inconsequential to the [ALJ's] ultimate
5 nondisability determination."³² The party appealing the ALJ's decision generally
6 bears the burden of establishing harm.³³

7 IV. Analysis

8 A. Opinion Evidence: Plaintiff establishes consequential error.

9 Plaintiff challenges the ALJ's consideration of the opinions of Ms. Sharma,
10 Dr. Nestler, Dr. Marks, and Dr. Carstens. As discussed below, the Court finds the
11 ALJ erred.

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13 ²⁹ *Molina v. Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012).

14 ³⁰ *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (The court "must
15 consider the entire record as a whole, weighing both the evidence that supports and
16 the evidence that detracts from the Commissioner's conclusion," not simply the
17 evidence cited by the ALJ or the parties.) (cleaned up); *Black v. Apfel*, 143 F.3d 383,
18 386 (8th Cir. 1998) ("An ALJ's failure to cite specific evidence does not indicate that
19 such evidence was not considered[.]").

20 ³¹ *Molina*, 674 F.3d at 1111.

21 ³² *Id.* at 1115 (cleaned up).

22 ³³ *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

1 1. Standard

2 The weighing of medical opinions is dependent upon the nature of the
3 medical relationship, i.e., whether a medical provider is 1) a treating provider, 2)
4 an examining provider who examines but did not treat the claimant, or 3) a
5 reviewing provider who neither treated nor examined the claimant.³⁴ Generally,
6 more weight is given to the opinion of a treating physician than to an examining
7 physician's opinion and both treating and examining opinions are to be given more
8 weight than the opinion of a reviewing physician.³⁵

9 When a treating physician's or evaluating physician's opinion is not
10 contradicted by another physician, it may be rejected only for "clear and
11 convincing" reasons, and when it is contradicted, it may be rejected for "specific
12 and legitimate reasons" supported by substantial evidence.³⁶ A reviewing
13 physician's opinion may be rejected for specific and legitimate reasons supported by
14 substantial evidence. The opinion of an "other" medical source may be rejected for
15 specific and germane reasons supported by substantial evidence.³⁷ The medical
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17 ³⁴ *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014).

18 ³⁵ *Id.*; *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995).

19 ³⁶ *Lester*, 81 F.3d at 830.

20 ³⁷ *See* 20 C.F.R. § 416.902 (For claims filed before March 27, 2017, acceptable
21 medical sources are licensed physicians, licensed or certified psychologists, licensed
22 optometrists, licensed podiatrists, qualified speech-language pathologists, licensed
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1 opinion of a reviewing physician serves as substantial evidence if it is supported by
2 other independent evidence in the record.³⁸

3 2. Ms. Sharma

4 Ms. Sharma counseled Plaintiff on a regular basis—generally weekly—since
5 April 2015.³⁹ In March 2019, Ms. Sharma issued a letter identifying the diagnoses
6 as PTSD (chronic), major depressive disorder (moderate recurrent), and lower
7 cognitive functioning, and identifying Plaintiff's symptoms as low motivation, low
8 energy, lack of persistence, feelings of unworthiness, significantly low self-esteem,
9 flashbacks to trauma that cause complete emotional shutdown (shutting his eyes,
10 disconnect, tiredness), problems with too much sleep, lower cognitive functioning,
11 difficulties/slowness with his normal activities of daily living (which contributed to
12 his marriage dissolution, house foreclosure, and homelessness), and problems with
13 his memory recall and follow through, including challenges with mixing up
14 scheduled times, forgetting appointments, and shutting down in his process
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audiologists, licensed advanced practice registered nurses, and licensed physician
assistants within their scope of practice—all other medical providers are “other”
medical sources.); *Molina*, 674 F.3d at 1111; *Bruce v. Astrue*, 557 F.3d 1113, 1115
(9th Cir. 2009).

³⁸ *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995).

³⁹ AR 57 & 366-67.

1 appointments.⁴⁰ Ms. Sharma opined that Plaintiff's mental health impairments
2 markedly impact his ability to maintain gainful employment, including:

- 3 • having a very low capacity for follow through and struggling with
4 directions that are more than two steps.
- 5 • having difficulty completing session homework because of his lack of
6 persistence and his defense mechanism of shutting down and giving up.
- 7 • taking a very long time to process information due to his lower cognitive
8 functioning.
- 9 • having significant impairments in relationships, including the inability to
10 take constructive feedback because he emotionally shuts down and
11 isolates, thereby creating problems about consistent and timely
12 attendance.
- 13 • having difficulty keeping work pace.
- 14 • having difficulty with solving simple problems due to his significant rigid
15 thinking.

16 Ms. Sharma stated, "[Plaintiff] may present himself in a way that seems he is
17 capable, but when one spends time with him his impairments are very evident . . .
18 [Plaintiff] may be able to get a job, as he presents as capable, but due to interfering
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22 ⁴⁰ AR 366-67.

1 symptoms I do not see him being able to keep one for more than a month or so.⁴¹

2 Two weeks later, Ms. Sharma wrote another letter⁴²:

3 [REDACTED] has been my client since 4/29/2015. I do take notes, but it is minimal necessary and
4 will not be helpful for his case and I believe will create a cost for him that is not helpful. The
5 records are very minimal and only cover the bases that are necessary. I provided the letter
6 that outlines his diagnosis, and prognosis. If you have any questions regarding this please
feel free to call or email at your earliest convenience.

7 The ALJ gave Ms. Sharma's opinion little weight because 1) she did not provide
8 treatment notes to support her opinion, 2) she is not an acceptable medical source
9 capable of assessing Plaintiff's work limitations, and 3) her remarks are
10 inconsistent with Plaintiff's activities of daily living and care for his son.

11 Plaintiff argues the ALJ erred by not developing the record by subpoenaing
12 Ms. Sharma's treatment records. While an ALJ need not subpoena all medical
13 records, 20 C.F.R. § 1450(d)(1) provides:

14 When it is reasonably necessary for the full presentation of a case, an
15 [ALJ] . . . may, on his or her own initiative or at the request of a party,
16 issue subpoenas for the appearance and testimony of witnesses and
for the production of books, records, correspondence, papers, or other
documents that are material to an issue at the hearing.

17 The Commissioner contends the ALJ was not required to subpoena Ms. Sharma's
18 counseling records because it was Plaintiff's responsibility to file notice for the
19 issuance of the subpoena if Plaintiff deemed them material, and Plaintiff did not do

21 ⁴¹ AR 367.

22 ⁴² AR 368.

1 so.⁴³ This argument fails to appreciate that Plaintiff did not deem Ms. Sharma's
2 treatment notes reasonably necessary for the full presentation of Plaintiff's case.⁴⁴
3 Plaintiff argues that he is unable to sustain full-time work and maintains that
4 Ms. Sharma's treating opinion, along with her noted observations and findings, set
5 forth why Plaintiff is unable to work. Plaintiff highlights that Ms. Sharma herself
6 stated she took minimal notes during her treatment sessions and that her minimal
7 notes would not be helpful for this case, particularly as her opinion detailed her
8 diagnoses and prognosis. Rather than accept Ms. Sharma's opinion, the ALJ
9 deemed Ms. Sharma's treatment records (or the lack thereof) material to an issue
10 in this case, i.e., what weight to give to Ms. Sharma's opinion and what limitations
11 to include in the RFC. The ALJ gave little weight to Ms. Sharma's opinion, in part,
12 because she did not provide treatment notes to support her opinion. That she did
13 not provide treatment notes, however, is not a germane reason for the ALJ to
14 discount Ms. Sharma's opinion given that Ms. Sharma advised that her treatment
15 notes contained minimal information and so she had instead authored the two-
16 page opinion detailing the reasons for her opinion. Because the treatment notes, or

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18 ⁴³ ECF No. 17 at 8-9.

19 ⁴⁴ At the administrative hearing, Plaintiff's counsel highlighted that the ALJ could
20 issue a subpoena if the ALJ deemed the treatment records material. AR 54. *See*
21 *also* AR 52-54 & 81 (indicating that Ms. Sharma's opinion is consistent with Dr.
22 Marks' opinion that Plaintiff is unable to maintain necessary pace and attendance).
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1 lack thereof, were material to the ALJ's consideration of Ms. Sharma's opinion, the
2 ALJ erred by not subpoenaing her records or her testimony.⁴⁵

3 The Commissioner argues any error is harmless because 1) further
4 development of the record was unlikely to yield a different result because
5 Ms. Sharma had stated her records were very minimal, and 2) the ALJ offered
6 other reasons for discounting Ms. Sharma's opinions. As to the first point, the
7 Court is limited to addressing the reasons articulated by the ALJ for discounting
8 Ms. Sharma's opinion.⁴⁶ Here, the ALJ discounted Ms. Sharma's opinion because it
9 was not supported by treatment notes. The ALJ did not discount Ms. Sharma's
10 opinion because it was not explained or supported by the information contained
11 within the two-page opinion itself. Aware that the treatment records were unlikely
12 to provide information beyond attendance dates and other general information, the
13 ALJ could have developed the record by subpoenaing Ms. Sharma's testimony, *or*

17 ⁴⁵ See *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996) ("If the ALJ thought he
18 needed to know the basis of Dr. Hoeflich's opinions in order to evaluate them, he
19 had a duty to conduct an appropriate inquiry, for example, by subpoenaing the
20 physicians or submitting further questions to them.").

21 ⁴⁶ See *Burrell v. Colvin*, 775 F.3d 1133, 1138 (9th Cir. 2014) (recognizing court
22 review is constrained to the reasons the ALJ asserts).
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1 the ALJ needed to not discount Ms. Sharma's opinion on the basis of unprovided
2 treatment notes.⁴⁷

3 The Court turns now to the other two reasons articulated by the ALJ for
4 discounting Ms. Sharma's opinion: that Ms. Sharma was not an acceptable medical
5 source capable of assessing Plaintiff's work limitations and that Ms. Sharma's
6 remarks were inconsistent with Plaintiff's activities of daily living and care for his
7 son. As a counselor, Ms. Sharma is considered a medical source, but not an
8 acceptable medical source.⁴⁸ Even though she is not an acceptable medical source,
9 she may render an opinion about how Plaintiff's conditions affect his ability to
10 perform basic work activities.⁴⁹ The ALJ may not discount the opinion of a
11 nonacceptable, or "other," medical source without specific reasons germane to that
12 medical source.⁵⁰ Here, the ALJ accurately found Ms. Sharma was not an
13 acceptable medical source. However, Ms. Sharma's opinion, based on counseling
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15 ⁴⁷ See *Garcia v. Comm'r of Soc. Sec.*, 768 F.3d 925, 930-32 (9th Cir. 2014) (finding
16 that it was not clear from the record that the ALJ's error in failing to properly
17 develop the record was inconsequential to the nondisability determination).

18 ⁴⁸ See 20 C.F.R. § 416.902(a) (applying regulation as it applies to pre-March 27,
19 2017 claims).

20 ⁴⁹ *Bruce*, 557 F.3d at 1116.

21 ⁵⁰ See 20 C.F.R. § 416.927(f)(1); *Molina*, 674 F.3d at 1111-12. See also *Stout v.*
22 *Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1053 (9th Cir. 2006).
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1 Plaintiff for four years, provided insight about how Plaintiff's impairments affect
2 his ability to function. As such, it should have been considered by the ALJ.⁵¹ On
3 this record, the ALJ erred by finding that Ms. Sharma was not capable of offering
4 an opinion as to how Plaintiff's impairments limited his ability to work.⁵²

5 Finally, the ALJ discounted Ms. Sharma's opinion because her "remarks
6 were inconsistent with the evidence showing Plaintiff was capable of activities of
7 daily living and the care of an infant."⁵³ An ALJ may discount an opinion that is
8 inconsistent with the claimant's ability to perform and sustain daily living
9 activities, including child care.⁵⁴ Yet, the ALJ must be mindful that "many home
10 activities are not easily transferable to what may be the more grueling
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13 ⁵¹ 20 C.F.R. § 416.927(f)(1); Soc. Sec. Rlg. 06-03p (as applicable to pre-March 27,
14 2017 claims).

15 ⁵² The Commissioner accurately highlights that the ALJ need not consider an
16 opinion about whether a claimant is or is not disabled as such an opinion is
17 reserved to the Commissioner and is therefore not entitled special significance. *See*
18 20 C.F.R. § 416.927(d). However, Ms. Sharma opined specific nonexertional
19 limitations. She did not simply offer an opinion that Plaintiff was disabled.

20 ⁵³ AR 33 (cleaned up).

21 ⁵⁴ *Trevizo v. Berryhill*, 871 F.3d 664, 676 (9th Cir. 2017); *Rollins v. Massanari*, 261
22 F.3d 853, 856 (9th Cir. 2001); *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989).

1 environment of the workplace.”⁵⁵ Here, there is no issue as to whether Plaintiff is
2 able to perform the physical demands of work or daily living activities. Rather the
3 question is whether Plaintiff’s mental impairments impact his ability to perform
4 and sustain work. The ALJ summarily found that Plaintiff was capable of
5 performing activities of daily living and caring for an infant, citing to the adult
6 function report prepared on Plaintiff’s behalf and Dr. Nestler’s December 2016
7 consultative examination.⁵⁶ The ALJ does not explain why Plaintiff’s day-time care
8 for a newborn, which involved getting up when the baby got up, and doing some
9 household chores when necessary, such as sweeping and dishwashing, is
10 inconsistent with Ms. Sharma’s opinion that Plaintiff’s impairments limit the
11 consistency, persistence, and pace of his daily living activities. Ms. Sharma
12 highlighted that Plaintiff’s impacted daily living abilities were evidenced by his
13 marriage dissolution and his estranged wife taking their son in the fall of 2017, his
14 house foreclosure, and his homelessness. The Commissioner argues that caring for
15 a newborn should be considered clear evidence that Plaintiff can maintain a full-
16 time job on a sustained basis. However, this argument fails to reflect that
17 Plaintiff’s caring for his less than two-year-old son occurred at Plaintiff’s home
18 (where his social anxiety is lessened), that a newborn and toddler often sleep for
19 several hours of the day, and that Plaintiff no longer cared for his son beginning in
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21 ⁵⁵ *Fair*, 885 F.2d at 603.

22 ⁵⁶ AR 252-59 & 329-33.

1 the fall of 2017. Without more explanation as to why Ms. Sharma's opinion is
2 inconsistent with Plaintiff's activities and care for his son through the fall of 2017,
3 this sole remaining reason cannot serve as a germane basis for discounting
4 Ms. Sharma's treating opinion, rendered after four years of regular counseling.

5 3. Dr. Nestler, Dr. Marks, and Dr. Carstens

6 Plaintiff argues the ALJ erred by improperly giving more weight to
7 Dr. Nestler's consultative opinion while giving no weight to Dr. Marks' consultative
8 opinion, an opinion that was largely adopted by Dr. Carstens on review.

9 In December 2016, Dr. Nestler reviewed the Social Security Administration
10 (SSA) function report completed by Plaintiff's then-wife, obtained a medical and
11 personal history from Plaintiff, and conducted a mental status examination.⁵⁷
12 Dr. Nestler was unable to verify that Plaintiff met the criteria for any DSM-5
13 diagnosis, as he did not appear to be severely anxious or depressed, or have any
14 mental health impairment. She opined that Plaintiff would not have difficulty
15 performing simple and repetitive tasks or detailed tasks, his cognitive testing was
16 normal, he would not have any difficulties with supervisors, coworkers, or the
17 public, and he would be able to deal with the usual stress encountered in the
18 workplace and perform work activities on a consistent basis without special or
19 additional instructions. The ALJ gave partial weight to Dr. Nestler's consultative
20 opinion because 1) she was familiar with the SSA disability program, 2) her
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22 ⁵⁷ AR 329-33.
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1 opinion was based on an examination of Plaintiff, and 3) the opinion was consistent
2 with the overall medical evidence at that time even though subsequent medical
3 evidence and Plaintiff's testimony showed that Plaintiff had more mental
4 limitations than those opined by Dr. Nestler.

5 About a year later, Dr. Marks reviewed Plaintiff's SSA intake interview and
6 psychologically examined Plaintiff.⁵⁸ After performing a clinical interview and a
7 mental status examination, Dr. Marks diagnosed Plaintiff with unspecified
8 schizophrenia spectrum and other psychotic disorder, unspecified alcohol-related
9 disorder, unspecified anxiety disorder, unspecified depressive disorder, unspecified
10 trauma- and stressor-related disorder, and unspecified cannabis-related disorder.
11 She opined that Plaintiff was not (or was only mildly) limited in his ability to
12 understand, remember, and persist in tasks by following very short and simple
13 instructions, moderately limited in his abilities to learn new tasks and perform
14 routine tasks without special supervision, and markedly limited in his abilities to:

- 15 • understand, remember, and persist in tasks by following detailed
16 instructions.
- 17 • perform activities within a schedule, maintain regular attendance,
18 and be punctual within customary tolerances without special
19 supervision.
- 20 • adapt to changes in a routine work setting.

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22 ⁵⁸ AR 343-48.

- make simple work-related decisions.
- be aware of normal hazards and take appropriate precautions.
- ask simple questions or request assistance.
- communicate and perform effectively in a work setting.
- maintain appropriate behavior in a work setting.
- complete a normal workday and work week without interruptions from psychologically based symptoms.
- set realistic goals and plan independently.

Dr. Marks also mentioned that Plaintiff would benefit from counseling and a referral to the state vocational rehabilitation agency to help him find additional training. Dr. Marks noted that Plaintiff “presents well,” and that she was under “the impression that he isn’t telling me all the details about much of his life. More information is strongly recommended in order to make the best recommendation for him.”⁵⁹ The ALJ gave little weight to Dr. Marks’ opinion because 1) she conducted a cursory evaluation, 2) her check-box opinion offered no supporting explanation and was not supported by the unremarkable mental status examination, 3) her opinion was internally inconsistent, and 4) it was inconsistent with the longitudinal medical record.⁶⁰

⁵⁹ AR 346.

⁶⁰ AR 32.

1 Shortly after Dr. Marks' examination, Dr. Carstens reviewed Dr. Marks'
2 psychological evaluation.⁶¹ Dr. Carstens agreed with Dr. Marks' assessed diagnosis
3 and opined limitations but found, based on the severity of Dr. Marks' ratings and
4 clinical observations, that Plaintiff's impairment was expected to persist a
5 minimum of 24 months, rather than 12 months. The ALJ gave little weight to
6 Dr. Carstens' opinion because it was 1) conclusory, 2) not well-explained, and
7 3) based on minimal record review.

8 Plaintiff argues the ALJ erred by giving little weight to Dr. Marks' and
9 Dr. Carstens' opinions, while giving partial weight to Dr. Nestler's opinion.
10 Beginning with Dr. Nestler, the ALJ first gave partial weight to Dr. Nestler's
11 opinion because she was familiar with the SSA disability program.⁶² While an ALJ
12 may consider "the amount of understanding [that a medical source has] of our
13 disability programs and their evidentiary requirements,"⁶³ the ALJ failed to
14 likewise give partial weight to the opinions of Dr. Marks and Dr. Carstens, who are
15 also familiar with the SSA disability program because they both served as
16 psychologists to determine the social-security-disability eligibility for Plaintiff. ⁶⁴

18 ⁶¹ AR 340-42 & 349-50.

19 ⁶² AR 32.

20 ⁶³ 20 C.F.R. § 416.927(c)(6).

21 ⁶⁴ See, e.g., <https://www.dshs.wa.gov/esa/disability-determination-services> (last
22 viewed May 25, 2021).

1 Accordingly, Dr. Nestler's familiarity with the SSA disability program was not a
2 legitimate reason to give more weight to Dr. Nestler's opinion than to Dr. Marks' or
3 Dr. Carstens' opinions.

4 Second, the ALJ gave partial weight to Dr. Nestler's opinion because her
5 assessment was based on an examination of Plaintiff.⁶⁵ However, Dr. Marks'
6 assessment was also based on an examination of Plaintiff; yet the ALJ did not
7 likewise credit Dr. Marks' opinion. Instead, the ALJ found Dr. Marks' psychological
8 consultative examination was cursory, without citing any supporting evidence to
9 establish it was a more cursory examination than the one conducted by Dr. Nestler.
10 This was error.

11 Third, the ALJ found Dr. Nestler's opinion was consistent with the medical
12 evidence of record at the time she examined Plaintiff in December 2016, but that
13 subsequent medical evidence and Plaintiff's testimony showed Plaintiff had some
14 mental limitations, though not as extensive as opined by Dr. Marks or
15 Dr. Carstens.⁶⁶ The ALJ does not explain why he gave Dr. Nestler's opinion weight
16 when Dr. Nestler did not find any severe impairment.⁶⁷ In comparison, the ALJ
17 found that, beginning by at least October 2016, Plaintiff had the severe
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19 ⁶⁵ AR 32.

20 ⁶⁶ AR 32-32.

21 ⁶⁷ AR 332 (finding she was "unable to verify that he meets criteria for any DSM-5
22 diagnosis").
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1 impairments of depressive disorder and PTSD. Without further explanation as to
2 why Dr. Nestler's opinion was consistent with and supported by the medical
3 evidence in December 2016, it is unclear why the ALJ gave any weight to
4 Dr. Nestler's opinion—an opinion that indicated Plaintiff had no severe
5 impairment or limitations.

6 Turning to Dr. Marks' opinion, the ALJ discounted Dr. Marks' opinion as
7 being cursory and providing little explanation for the check-box form.⁶⁸ But
8 Dr. Marks, like Dr. Nestler, performed a consultative examination and utilized a
9 standard form to set forth her opinion. The standard form included Dr. Marks'
10 observations and findings, including her findings that Plaintiff scored a 30 (severe)
11 on the Beck Depression Inventory and a 57 (severe) on the Beck Anxiety Inventory,
12 that his perception was not within normal limits, and that his working memory
13 was poor.⁶⁹ The ALJ must more meaningfully explain why these findings and
14 observations are inconsistent with Dr. Marks' moderate and marked limitations,
15 which Dr. Carstens also agreed with. The ALJ also discounted Dr. Marks' opinion
16 because her marked limitations were inconsistent with her recommendation that
17 Plaintiff be referred to a work training program and that there was no need for a
18 representative payee.⁷⁰ But mere participation (or recommendation that one
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20 ⁶⁸ AR 32.

21 ⁶⁹ AR 344-48.

22 ⁷⁰ AR 32.

1 participate) in a work training program should not be relied on as evidence that the
2 claimant is not disabled by a mental impairment. Rather, the type, nature, and
3 duration of the training completed by the claimant should be evaluated.⁷¹ Finally,
4 the ALJ discounted Dr. Marks' opinion because Plaintiff received limited mental-
5 health treatment. On this record—a record that did not contain a recommendation
6 that Plaintiff take prescribed medication to treat his mental health conditions or
7 evidence that he refused to take medication without good cause, and which
8 indicates Plaintiff engaged in almost weekly counseling for four years—the ALJ
9 must more meaningfully explain why Plaintiff's course of treatment serves as a
10 basis to discount Dr. Marks' opinion.

11 It is not clear that the ALJ's errors when discounting Ms. Sharma's opinion
12 and weighing the medical opinions were inconsequential.⁷²

15 ⁷¹ See *DeLorme v. Sullivan*, 924 F.2d 841, 849 n.18 (9th Cir. 1991) (advising that
16 mere participation in a work training program should not be relied on as evidence
17 that the person is not disabled by the mental impairment—the totality of the work-
18 training circumstances must be evaluated).

19 ⁷² Because of the ALJ's combined errors when weighing Ms. Sharma's opinion and
20 the Dr. Nestler's and Dr. Marks' opinions, the Court need not discuss the ALJ's
21 weighing of Dr. Carstens' opinion. On remand, the ALJ is to reconsider each
22 opinion.
23

1 **B. Remand for Further Proceedings**

2 Because the ALJ erred with respect to weighing opinions, the ALJ erred in
3 determining that Plaintiff could perform past work and that he was, therefore, not
4 disabled.⁷³ Plaintiff contends that an award of benefits is appropriate.

5 The decision whether to remand a case for additional evidence, or simply to
6 award benefits, is within the Court's discretion.⁷⁴ Remand for further proceedings
7 is the usual course, absent clear evidence from the record that a claimant is
8 entitled to benefits.⁷⁵ For instance, where "there are outstanding issues that must
9 be resolved before a determination can be made, or if further administrative
10 proceedings would be useful, a remand is necessary."⁷⁶

11 Here, there are various inconsistencies and conflicts in the record that make
12 further administrative proceedings useful. For example, the opinions vary as to
13 what Plaintiff's mental health impairments are and the limiting impact of the
14 impairments. A cognitive consultative examination is needed to aid in the step-two

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16 ⁷³ See *Ghanim v. Colvin*, 763 F.3d 1154, 1166 (9th Cir. 2014).

17 ⁷⁴ See *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987) (citing *Stone v.*
18 *Heckler*, 761 F.2d 530 (9th Cir. 1985)).

19 ⁷⁵ *Leon v. Berryhill*, 880 F.3d 1041, 1045 (9th Cir. 2017); *Benecke v. Barnhart*, 379
20 F.3d 587, 595 (9th Cir. 2004) ("[T]he proper course, except in rare circumstances, is
21 to remand to the agency for additional investigation or explanation.").

22 ⁷⁶ *Leon*, 880 F.3d at 1047.

23

1 analysis (and the disability analysis as a whole). Plaintiff has a history of special
2 education courses, was found by Dr. Marks to have a poor working memory, was
3 noted by Dr. Nestler as slowly performing the math and spelling portions of the
4 examination, and was diagnosed as having lower cognitive functioning by
5 Ms. Sharma (a relevant fact even though she is not an acceptable medical
6 source).⁷⁷ Moreover, Dr. Marks noted that additional information was strongly
7 recommended to make the best decision.⁷⁸ In addition, as to Plaintiff's mental
8 health conditions, Dr. Marks and Dr. Carstens diagnosed Plaintiff with
9 schizophrenia and psychotic disorder but Dr. Nestler and those reviewing the
10 record in 2016 did not.⁷⁹ These conflicts should be resolved by the ALJ on remand,
11 rather than by the Court.⁸⁰

12 On remand, when assessing Plaintiff's symptoms, the ALJ must be mindful
13 that he must articulate clear and convincing reasons for discounting Plaintiff's
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16 ⁷⁷ AR 30, 64-65, 331-32, 339, & 366.

17 ⁷⁸ AR 346.

18 ⁷⁹ It was not legitimate for the ALJ to discount Dr. Marks' and Dr. Carstens'
19 schizophrenia and psychotic disorder diagnoses on the grounds that Ms. Sharma
20 did not diagnose schizophrenia or psychotic disorder, if she is not an acceptable
21 medical source who can offer such diagnoses.

22 ⁸⁰ *See id.*

1 symptoms.⁸¹ General findings are insufficient because the Court cannot affirm
2 discounting Plaintiff's symptoms for a reason not articulated by the ALJ.⁸² The
3 ALJ must identify what symptoms are being discounted and what evidence
4 undermines these symptoms.⁸³ When assessing Plaintiff's mental health
5 symptoms, the ALJ is encouraged to give more weight to the mental health
6 findings made during mental health examinations or treatment sessions, rather
7 than during appointments for solely physical conditions, such as Plaintiff's ear
8 drainage issue.⁸⁴ If the ALJ discounts Plaintiff's symptoms because he did not
9 report hearing voices during his examinations, the ALJ must consider whether
10 Plaintiff's mental health conditions contributed to his failure to report such
11
12
13
14

15 ⁸¹ *Ghanim*, 763 F.3d at 1163 (quoting *Lingenfelter*, 504 F.3d at 1036).

16 ⁸² *See Garrison*, 759 F.3d at 1010.

17 ⁸³ *Id.* (quoting *Lester*, 81 F.3d at 834, and *Thomas v. Barnhart*, 278 F.3d 947, 958
18 (9th Cir. 2002) (requiring the ALJ to sufficiently explain why he discounted
19 claimant's symptom claims)).

20 ⁸⁴ *See* AR 364-65. *See Ford v. Saul*, 950 F.3d 1141, 1156 (9th Cir. 2020) (comparing
21 psychologist's mental health findings against findings from other mental health
22 professionals).
23

1 symptoms.⁸⁵ As to Plaintiff's care for his son, the ALJ must consider that Plaintiff
 2 also reported that his limitations affected his ability to care for his son and,
 3 consistent with that report, he no longer cared for his son after November 2017.⁸⁶

4 **V. Conclusion**

5 Accordingly, **IT IS HEREBY ORDERED:**

- 6 1. Plaintiff's Motion for Summary Judgment, **ECF No. 16**, is
 7 **GRANTED.**
- 8 2. The Commissioner's Motion for Summary Judgment, **ECF No. 17**, is
 9 **DENIED.**
- 10 3. The Clerk's Office shall enter **JUDGMENT** in favor of Plaintiff
 11 **REVERSING** and **REMANDING** the matter to the Commissioner of
 12 Social Security for further proceedings consistent with this
 13 recommendation pursuant to sentence four of 42 U.S.C. § 405(g).
- 14 4. The case shall be **CLOSED.**

17 ⁸⁵ *Regennitter v. Comm'r of Soc. Sec. Admin.*, 166 F.3d 1294, 1209-1300 (9th Cir.
 18 1999) ("[I]t is a questionable practice to chastise one with a mental impairment for
 19 the exercise of poor judgment in seeking rehabilitation.").

20 ⁸⁶ AR 252-59; *see also* AR 244-51 & 366 ("He has significant impairment in holding
 21 consistency in his daily life activities which has created significant impairments in
 22 his relationships and actually contributed to his recent divorce.").

1 **IT IS SO ORDERED.** The Clerk's Office is directed to file this Order and
2 provide copies to all counsel.

3 **DATED** this 10th day of June 2021.

4 

5 _____
6 EDWARD F. SHEA
7 Senior United States District Judge